



Heather Shirley Smith
Deputy General Counsel

Duke Energy
40 W. Broad Street
Suite 690
Greenville, SC 29601

o: 864.370.5045
f: 864.370.5183

heather.smith@duke-energy.com

September 9, 2019

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
The Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: South Carolina Energy Freedom Act (H.3659) Proceeding to Establish Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Standard Offer, Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended) – S.C. Code Ann. Section 58-41-20(A)

**Docket No. 2019-185-E (Duke Energy Carolinas, LLC)
Docket No. 2019-186-E (Duke Energy Progress, LLC)**

Dear Mrs. Boyd:

This letter serves as the response of Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP," and together with DEC, the "Companies"), in response to the Office of Regulatory Staff's ("ORS") request (the "Request") filed in the above-referenced dockets (the "Duke Dockets") on August 8, 2019 and the Commission's August 23, 2019 Memo to Parties of Record Regarding Meeting to Demonstrate Web Conferencing.

ORS requests that the Public Service Commission of South Carolina (the "Commission") allow "ORS to present its expert witnesses in these dockets via video teleconferencing" in order to "reduce time and travel costs." The Companies have real and substantial interest in ensuring a complete evidentiary record, including reasonable opportunities for examination of potentially-adverse witnesses through in-person testimony in the Duke Dockets, as the Companies and customers could be prejudiced by any decision to utilize video teleconferencing without adequate safeguards. Given the complexities of the contested issues in the Duke Dockets, the Companies believe that any such decision to present a testifying expert witness via video teleconferencing, absent an exceptional circumstance, should be made (a) on a case-by-case basis, (b) through mutual agreement of the parties, and (c) only after each party's review of the testimony at issue. In particular, in a settled case or a case with few contested issues, there may be few issues with

The Honorable Jocelyn G. Boyd
 September 9, 2019
 Page 2

videoconferencing. However, in these cases which are “first of their kind” cases for South Carolina under a new law, where customer rates could be impacted by hundreds of millions of dollars due to the volume of QFs proposing to sell power under the avoided cost rates, terms and conditions at issue, the hearing process should continue to be carefully examined not only for efficiency but in light of the standards currently in place in South Carolina. At the present time, DEP and DEC do not yet formally object to video conferencing, but reserve the right to do so upon review of testimony yet to be filed in this docket. DEP and DEC also note that upon information and belief, none of the states in which they or their affiliates serve currently allow for cross examination by video conferencing in complex electric utility cases such as the instant proceedings.

Initially, it is important to note that the Commission will surely face similar proceedings in the future, and may be frequently called upon to consider the very issue set forth in the Request—the use of video teleconferencing to present expert testimony in complex, contested proceedings. The Commission itself has recognized that it routinely entertains complex, technical issues—so much so that “almost all witnesses who testify before [it] do so as experts.” *In Re: Petition of S.C. Elec. & Gas Co.*, Docket No. 2016-223-E, 2017 WL 841308, at *13 (Feb. 28, 2017). Furthermore, Section 58-41-20(A) of H.3659 (“Act 62”) states that “[a]ny decisions by the [C]ommission [in these proceedings] shall be just and reasonable to the ratepayers of the electrical utility, in the public interest . . . and shall strive to reduce the risk placed on the using and consuming public.” As such, any decision in the Duke Dockets regarding the use of video teleconferencing should not only account for the complexity of the issues, but also (a) how this decision will affect the similar dockets that the Commission will face going forward, and (b) the risk to customers arising from such decision.

Although South Carolina has declined to adopt a specific standard for the presentation of witnesses via video teleconferencing in a contested proceeding, it is clear that mere convenience alone (absent an agreement between the parties) is insufficient to justify the use of such technology in lieu of in-person testimony.¹ In balancing the use of video teleconferencing against rights afforded to parties under the Confrontation Clause of the United States Constitution,² South Carolina courts consider whether there exists some “important public policy or . . . exceptional circumstance.”³ However, courts in South Carolina remain reluctant to accept any form of testimony other than in-person testimony.⁴

In jurisdictions that have adopted a standard for the use of similar technology, courts note that it “should not be considered a commonplace substitute for in-court testimony”⁵ and should be used only when “necessary to further an important public policy.”⁶ For example, these courts have

¹ See *State v. Johnson*, 812 S.E.2d 739 (S.C. Ct. App. 2018), *reh'g denied* (Apr. 26, 2018), *cert. denied* (Aug. 3, 2018).

² See *S.C. Dep't of Soc. Servs. on Behalf of State of Tex. v. Holden*, 459 S.E.2d 846 (S.C. 1995) (noting that the Confrontation Clause applies to both criminal and civil proceedings).

³ *Johnson* 812 S.E.2d at 746.

⁴ See *id.*

⁵ *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999).

⁶ *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

considered factors such as poor health, inability to travel, and other vulnerabilities of the witness in deciding such important procedural issues.⁷ Indeed, other jurisdictions have recognized that if convenience alone were the determining factor in deciding whether to employ similar technology in lieu of in-person testimony, the number of requests to use such technology could increase substantially.⁸ Certainly, a heightened threshold must be required.

Here, the Request cites the need to reduce “time and travel costs” as a justification for employing video teleconferencing. Indeed, the Companies are sensitive to the fact that any such costs would be passed along to customers, and it is certainly understandable that ORS raised these concerns. However, the relatively modest travel costs must be balanced against the complex legal and technical issues presented in these proceedings and the significant potential financial obligations at issue in these proceedings. Moreover, the elements that courts—whether in South Carolina or otherwise—have traditionally deemed sufficient to present witnesses via video teleconferencing over the objection of a counterparty are not present here. The costs of hotels and airfare for these witnesses are much less than the potential “risk placed on the using and consuming public” as a result of decisions made in the Duke Dockets. Surely, if any proceedings require in-person testimony, it is these. Finally, it is unclear to Duke at this time why some or all of these experts would be required to make “multiple trips” or stay for any “very extended period” given other scheduling options available, and due to cases like these commonly taking place over multiple days. As they have with other proceedings, the Companies intend to work with ORS, other parties and the Commission on scheduling issues to reduce the risk and associated expense of presenting the in-person testimony of witnesses.

Finally, it must be recognized that practical difficulties necessarily arise when presenting witnesses via video teleconferencing. These difficulties are only compounded by the nature of these proceedings and the large number of parties involved in the Duke Dockets. For example, certain of the issues arising in the Duke Dockets contain highly technical material—some of which is likely to be presented by the experts put forth by ORS—requiring the use of exhibits and other visual aids. The difficulties inherent in presenting those materials, and then cross-examining experts in relation to those materials, would be significantly increased when these witnesses are presented via video teleconferencing. Finally, using video teleconferencing in the Duke Dockets without adequate safeguards has the potential to introduce any number of technical difficulties into the proceedings, and likely will not provide the viewing public the best opportunity to observe the proceedings as effectively as it would through in-person testimony.

To be clear, the Companies recognize that, from time to time, witnesses may require certain accommodations. In fact, the Companies have routinely taken steps to accommodate such needs—like agreeing to “dates-certain” for testifying witnesses to appear on a specified day, or stipulating testimony such that a witness does not have to appear—and the Companies will continue to look for such opportunities in the future (including in the Duke Dockets) where all interests are properly considered and protected. However, the Duke Dockets present complex subject matter, many

⁷ See, e.g., *Johnson* 812 S.E.2d 739.

⁸ See *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

The Honorable Jocelyn G. Boyd
September 9, 2019
Page 4

contested issues, and numerous hearing participants. The allowance of video teleconferencing as a matter of convenience over the objection of a counterparty in these technical dockets will set an unfavorable precedent going forward. For example, it would be hard to imagine any such request being denied in the future given that mere convenience had passed the threshold in these proceedings.

Given the importance of these proceedings, the existing precedent on this issue, and the need to continue setting predictable hearing practices going forward, DEP and DEC believe that in-person testimony must generally be considered the preferred method of presentation in the Duke Dockets. Therefore, these proceedings do not present the appropriate opportunity for the Commission to employ video teleconferencing as a matter of mere convenience over the objection of a counterparty. Based upon the foregoing, the Companies respectfully request that the Commission only allow presentation of witnesses via video teleconferencing in the Duke Dockets (a) on a case-by-case basis, (b) through mutual agreement of the parties, and (c) after each party's review of the testimony at issue.

Thank you for your consideration of these matters.

Sincerely,



Heather Shirley Smith

cc: Parties of record (via email)